

HOLLAND & HART<sup>LLP</sup>



# Free Clinics and the FTCA

Kim C. Stanger  
(11/12)

# Written Materials



- Free Clinics FTCA Program Policy Guide (Policy Information Notice (“PIN”) 2011-02)
- CY2012 FTCA Deeming Application for Free Clinics (Program Assistance Letter (“PAL”) 2011-09)
- Free Clinics FTCA Program Data Reporting (PAL 2012-05)
- Sample Patient Notice of FTCA Limitations

# Background

■ July 28, 1945



# Federal Tort Claims Act ("FTCA")



- Waives U.S. govt's sovereign immunity.
- Allows persons to sue the govt for personal injury due to negligent or wrongful acts of federal employees, but subject to important limits.
  - Govt is sole defendant.
  - Govt represented by Dept. of Justice.
  - Case tried in federal court.
  - No jury.
  - No punitive damages.



# Govt Extends FTCA to FQHCs



- Govt subsidizes FQHCs, e.g.,
  - Community Health Centers
  - Migrant Health Centers
  - Health Care for Homeless Centers
  - Public Housing Primary Care Centers
- Govt concerned that grant money being spent on medmal insurance.
- HIPAA (1996): FQHCs and their personnel are “deemed” to be employees of Public Health Services (“PHS”) and covered by FTCA.

# Govt Extends FTCA to Free Clinic Personnel



- HIPAA (2004): Govt extends FTCA to volunteers at free clinics who are “deemed” to be PHS employees.
    - Must apply to obtain “deemed” status
  - PPACA (2010): Govt extends FTCA to board members, officers, employees, and contractors of free clinics who are “deemed” to be PHS employees.
    - Must apply to obtain “deemed” status
  - PIN 2011-02 (3/22/11): Summarizes requirements for Free Clinic FTCA Program.
    - Replaces earlier PIN
    - Supplemented by Program Assistance Letters (“PALs”)
- (42 USC § 233(o))

# FTCA: Benefits to Free Clinic



- FTCA essentially serves as medical malpractice (“medmal”) insurance for free clinic personnel who are “deemed” to be govt employees.
  - No personal liability for covered individuals.
  - No direct cost for FTCA protection.
  - No monetary policy limits.
  - Occurrence based coverage.
- Removes need to purchase medmal insurance for “deemed” personnel.
- Beware limits to FTCA coverage...

# FTCA: Benefits to Free Clinic



- FTCA makes it harder for plaintiff to recover damages, thereby discouraging litigation.
  - Federal 2-year statute of limitations from time plaintiff discovered or should have discovered injury.
  - Must sue United States, not individuals.
  - Defended by HHS OGC and DOJ.
  - Preliminary administrative review process.
    - Tolls lawsuit until claim denied or fail to settle within 6 months.
    - Must sue within 6 months after claim denied or failed to settle.
  - Federal court trial.
  - No jury.
  - No punitive damages.
- Must still report adverse decision to NPDB.
  - Reviewed by Medical Claims Review Panel.





# Free Clinics v. FQHCs



- FTCA rules differ between
  - Free clinics
  - FQHCs
- Don't get confused by different requirements or guides.

# Eligible Free Clinics



- To participate in FTCA Program, free clinic must satisfy the following:
  - Healthcare facility operated by nonprofit private entity.
  - Cannot accept reimbursement from any private or public third party payor for healthcare services.
  - Cannot charge patient for services unless charges are based on patient's ability to pay.
  - May accept patient's voluntary donations.
  - Licensed or certified to provide health services per applicable state and federal law.
- Free clinic does not receive FTCA protection.
- Free clinic may sponsor personnel.

# Eligible Personnel



- Board members
- Officers
- Employees
  - W-2 employees
- Contractors
  - Contract for services.
  - Healthcare practitioner who is licensed or certified, e.g., physician, dentist, RN, LPN, technician, social worker.
  - Contract with individual, not corporation.
- Volunteers
  - Healthcare practitioner who is licensed or certified.



# Eligible Personnel: Board Members and Officers



- Sponsored by free clinic.
- Documentation that:
  - Confirms their relationship with sponsoring clinic.
  - Specifies their roles and duties.



# Eligible Personnel: Employees



- W-2 employee.
- Sponsored by free clinic.
- If a healthcare professional:
  - Licensed or certified per applicable law.
  - Credentialed and privileged.
  - Provide services at free clinic or through its offsite programs.
  - Provide medical care authorized under 42 USC § 1396.
  - Receive no compensation for services from patients or any third party payor.
  - May be reimbursed by free clinic for expenses.
  - Provide notice of FTCA limits on liability to patient before services are provided.

# Eligible Personnel: Contractors



- Contract for services.
- Individuals, not corporations or companies
- Sponsored by free clinic.
- Licensed or certified healthcare provider per applicable law.
- Credentialed and privileged.
- Provide services at free clinic or through its offsite programs.
- Provide medical care authorized under 42 USC § 1396.
- Receive no compensation for services from patients or any third party payor.
- May be reimbursed by free clinic for expenses.
- Provide notice of FTCA limits on liability to patient before services are provided.



# Eligible Personnel: Volunteers



- Sponsored by free clinic.
- Licensed or certified health care professional under applicable state law.
- Provide services to patients at free clinic or through offsite programs or events carried out by sponsoring free clinic.
- Provide medical care authorized under 42 USC § 1396.
- Receive no compensation for services from patients or any third party payor.
- May be reimbursed by free clinic for expenses.
- Provide notice of FTCA limits on liability to patient before services are provided.

# “Free” Clinic



- Cannot receive compensation from third party payor.
- Cannot charge patient unless charge is based on patient's ability to pay.
- Lose FTCA coverage for that patient if patient charged (e.g., sliding scale) even though subsequently decide not to pursue charge unless:
  - Charge was caused by administrative error, or
  - Decision to forego charge was not made in bad faith, e.g., to secure FTCA coverage.



# Covered Services



- FTCA Program covers negligent acts omissions that
  - Arise from services authorized under 42 USC § 1396
    - “(1) medical assistance on behalf of families with dependent children and of aged, blind, or disabled individuals, whose income and resources are insufficient to meet the costs of necessary medical services, and
    - “(2) rehabilitation and other services to help such families and individuals attain or retain capability for independence or self-care.”

# Covered Services



- FTCA Program covers negligent acts omissions that
  - Arise from medical, dental, surgical, related services at
    - Free clinic, or
    - Free clinic's offsite programs, e.g., health fair or other events where clinic provides routine health screenings;
  - Occur during effective deeming period after deeming application approved; and
  - No charge imposed on patient.
- If question whether offsite program is covered, seek clarification from the Program.

# FTCA Limits



- FTCA protection does NOT extend to:
  - Free clinic entity itself, but—
    - Patients at free clinic are not the type that would typically sue.
    - Free clinics are unlikely targets given lack of assets.
    - Free clinics likely not liable for acts of volunteers or contractors so long as they are not agents of free clinic.
  - Beware negligent credentialing claim.

# FTCA Limits



- FTCA protection does NOT extend to:
  - Persons who are not “deemed” to be covered.
    - Contractors who are not licensed health care professionals.
    - Persons for whom “deeming” status not granted.
  - Acts other than medical, e.g., claims covered by
    - General liability insurance
    - Employment practices insurance
    - D&O or E&O coverage
  - Intentional acts.
  - Contract claims.
  - Statutory violations.





# FTCA Limits



- FTCA protection does NOT extend to:
  - Acts for which payment received from patient or payor.
  - Acts outside covered services.
  - Acts that were not performed in clinic or its offsite activities.
  - Acts outside course and scope of services for clinic.
- Gap insurance?
  - General liability.
  - Employer liability.
  - D&O and E&O.
  - Coverage for entity?

# FTCA Limits



- FTCA protection does NOT protect against:
  - NPDB reports
    - If claim paid, Medical Claims Review Panel will review to determine if NPDB report is required.
  - Action by state or federal licensing boards or certifying agencies, e.g., Board of Medicine, Board of Nursing, etc.
  - Adverse credentialing actions by clinic or other health care facilities.

# FTCA Program Requirements



- Credentialing and privileging
  - See sample chart.
- Risk management
- Patient notice of limited legal liability
- Review of med mal claims
- Annual data reporting for sponsoring free clinics

# FTCA Program Requirements: Credentialing and Privileging



- Credentials = confirm qualifications
- Privileges = authorizing specific clinic privileges
- Primary source verification =
  - Verification from original source or approved agent
    - Direct correspondence, telephone, internet, etc.
  - May use credentials verification organization (CVO), but responsible for its information.
    - ECFMG, ABMS, AOA, AMA Masterfile, etc.
- Secondary source verification =
  - Verification by means other than primary source.
    - Viewing original or copy of certificate, etc.



# FTCA Program Requirements: Credentialing and Privileging



## Licensed Independent Practitioners

- Primary source verification
  - Current licensure
  - Relevant education, training or experience
- Secondary source verification
  - Identification (e.g., govt issued picture ID)
  - DEA registration, if applicable
  - Hospital admitting privileges, if applicable
  - Immunization and TB skin test result status
  - Life support training, if applicable
- Additional verification
  - Fitness and ability to exercise requested privileges
  - NPDB query

# FTCA Program Requirements: Credentialing and Privileging



## Licensed Independent Practitioners (cont.)

- Verify competence to perform services by, e.g.,
  - Primary source verification of course of study.
  - Documented review of competence by qualified supervising clinician.
  - Proctoring by qualified clinician.
- Medical director or staff makes recommendation to governing board.
- Governing board makes credentialing decision, or delegates to appropriate person per policy or bylaws.
- For FTCA coverage, complete before services provided.

# FTCA Program Requirements: Credentialing and Privileging



## Licensed Independent Practitioners (cont.)

- Clinic may grant temporary privileges to LIP per policy:
  - To meet important patient care need for limited time.
    - verify current licensure and competence.
  - New volunteer for no more than 60 days.
    - current licensure and no prior adverse action against licensure.
    - relevant training and experience.
    - current competence for privileges.
    - no prior history of adverse action against privileges.
    - NPDB history.

# FTCA Program Requirements: Credentialing and Privileging



## Licensed Independent Practitioners (cont.)

- Re-credential and re-privilege at least every 2 years.
  - Primary source verification
    - Licensure, registration or certification.
  - Secondary source verification
    - Adherence to free clinic's policies and rules.
    - Relevant education, training and experience.
    - Competence to perform services.
    - No restrictions on privileges at any other organization.
  - Assess current competency
    - Synopsis of peer review / performance improvement activity.
    - Supervisor's evaluation.
  - NPDB query.
- Appeal process for denials.

# FTCA Program Requirements: Credentialing and Privileging



## Other Licensed or Certified Practitioners

- Primary source verification
  - Licensure, registration or certification
- Secondary source verification
  - Education and training
  - Identification (e.g., government issued picture ID)
  - DEA registration, if applicable
  - Hospital admitting privileges, if applicable
  - Immunization and PPD status
  - Life support training, if applicable
- NPDB query.
- Complete credentialing before services provided.





# FTCA Program Requirements: Credentialing and Privileging



## Other Licensed or Certified Practitioners (cont.)

- Verify competence to perform services by, e.g., orientation during which supervisor monitors services.
- Executive director or designee approves privileges.
  - Review credentialing process.
  - Verify competence.
  - Document privileges.

# FTCA Program Requirements: Credentialing and Privileging



## Other Licensed or Certified Practitioners (cont.)

- Re-credential and re-privilege at least every 2 years.
  - Primary source verification
    - Licensure, registration or certification
  - Secondary source verification
    - Adherence to free clinic's policies and rules.
    - Relevant education, training and experience.
    - Competence to perform services.
    - No restrictions on privileges at any other organization.
  - Assess current competency
    - Synopsis of peer review / performance improvement activity.
    - Supervisor's evaluation.
  - NPDB query, if applicable.



# FTCA Program Requirements: Risk Management



- Submit copy of clinic's quality improvement / quality assurance plan.
- Board reviews and signs at least every 3 years.
- QI/QA plan address:
  - Mitigate risk and improve quality.
  - Identify and evaluate concerns.
  - Educate personnel about QI/QA plan.
  - Responsibilities of management to implement plan.
  - Credentialing and privileging process.

# FTCA Program Requirements: Patient Notice



- Free clinic or covered practitioner must provide written notice of FTCA limits on liability to each patient.
  - Have each patient review notice prior to first encounter.
  - Recommend obtain patient's signature.
  - If emergency, provide as soon as you can.
  - If patient is incompetent, provide to guardian.
  - Include elements listed in sample.
- Sample available at:  
<http://bphc.hrsa.gov/ftca/freeclinics/index.html>.

# FTCA Program Requirements: Review of MedMal Claims



- Must include info about each practitioner's medmal history for prior 10 years for initial application / 5 years thereafter.
  - Describe suit.
  - Medical specialty involved.
  - Allegation.
  - Risk management actions taken by clinic and practitioner to prevent such claims in future.



# FTCA Program Requirements: Annual Data Reporting



- Free clinics must submit annual report to BPHC.
- Reporting forms are located at <http://bphc.hrsa.gov/ftca/freeclinics/index.html>.
- PAL 2012-05: requirements for 2012.
  - Must report:
    - Free clinic name and number (FC XXXX).
    - Number of all deemed individuals in calendar year.
    - Number of all deemed practitioners in calendar year.
    - Total number of FTCA-covered patient visits conducted by deemed LIP practitioners.
  - E-mail info to [freeclinicsFTCA@hrsa.gov](mailto:freeclinicsFTCA@hrsa.gov) by 4/1/13.

# FTCA: Application Process



- Initial deeming application
  - May submit at anytime.
  - Send e-copy to [freeclinicsFTCA@hrsa.gov](mailto:freeclinicsFTCA@hrsa.gov)
- Annual renewal application
  - Must reapply annually by deadline.
    - Must submit by July 27, 2012 for CY2013
  - Same form as initial deeming application..
- Supplemental deeming application
  - Use to add eligible individuals.

PAL 2012-04; <http://bphc.hrsa.gov/ftca/freeclinics/ftcafreeclinicappprocess.html>

## A wide-angle photograph of a rocky shoreline at dusk or dawn. The foreground is filled with smooth, dark grey rocks of various sizes, some partially submerged in shallow water. The water is calm, reflecting the warm, golden light of the low sun. In the background, a range of dark, silhouetted mountains stretches across the horizon under a sky filled with soft, orange and yellow clouds. The overall mood is serene and peaceful.

A screenshot of a Windows 7 taskbar. The taskbar is blue and contains several icons: a globe, a phone, a person, a green plus sign, an envelope, a folder, a document, a red X, a Bluetooth icon, a network icon, a volume icon, and a power icon. The system clock in the bottom right corner displays the time as 9:17 PM and the date as 10/25/2012.

# FTCA: Application Process



- Send completed excel file.
- Attach document explaining:
  - All disciplinary actions and malpractice claims against eligible individuals applying for deeming.
  - New applicants: prior 10 years
  - Renewal applicants: prior 5 years.
- Send e-copy to [freeclinicsFTCA@hrsa.gov](mailto:freeclinicsFTCA@hrsa.gov).
- See Free Clinic FTCA Program Application Checklist.

# FTCA: Claims Process



- If you are covered by FTCA and are sued
  - Send complaints or notices to:
    - Department of Health & Human Services  
Office of the General Counsel (“OGC”)  
Business and Administrative Law Section  
Claims and Employment Branch  
330 Independence Avenue, SW  
Mailstop: Capitol South  
Washington, DC 20201  
Phone: 202-233-0233  
Fax: 202-233-0323
  - Respond to OGC requests for info.
    - See detailed info in PIN 2011-12.



# FTCA: Claims Process



- OGC will verify “deemed” status, i.e., whether:
  - Individual is covered by FTCA.
  - Act or omission is within covered services and activities.
  - Act or omission occurred while providing services to free clinic patients.
  - Act or omission occurred after individual was “deemed” covered.
- Suspend document destruction upon discovery of potential suit.

# Additional Resources



- <http://bphc.hrsa.gov/ftca/freeclinics/index.html>

Free Clinics - Windows Internet Explorer provided by Holland and Hart, LLP

http://bphc.hrsa.gov/ftca/freeclinics/index.html

FTCA free clinics

Convert Select

Favorites CMS Stark CMS home Gmail EMTALA guidelines MapQuest HIPAA AKS Stark IDSOS Search AHLA Lists OCR HIPAA OIG e-CFR Hotmail IDAPA DHW Idaho Statutes

Free Clinics

Page Safety Tools

U.S. Department of Health and Human Services

www.hhs.gov

HRSA Health Resources and Services Administration

Primary Care: The Health Center Program

Search

This Site All HRSA Sites

HRSA eNews

A-Z Index Questions? Order Publications

Home About Health Centers Operating a Health Center Health Center Data Technical Assistance FTCA

Health Centers Free Clinics Risk Management About

Home > FTCA > Free Clinics

## Free Clinics

Share

[Free Clinics Home](#)

[FTCA Policy](#)

[Application Process](#)

[Deeming Application \(XLS - 120 KB\)](#)

[Supplemental Deeming Application \(XLS - 110 KB\)](#)

[Free Clinic Claims](#)

[Free Clinic FAQs](#)

[Risk Management Webinars](#)

The Health Insurance Portability and Accountability Act (HIPAA) granted medical malpractice coverage through the Federal Tort Claims Act (FTCA) to volunteer Free Clinic health care professionals. The Patient Protection and Affordable Care Act extended this coverage to free clinic board members, officers, employees, and individual contractors.

Congress first appropriated funds for FTCA medical malpractice protection for volunteer health care professionals in 2004. Free clinic volunteers, board members, employees, or contractors who meet all the requirements may be sponsored by the free clinic and "deemed" a federal employee by HRSA for the purpose of FTCA medical malpractice coverage.

FTCA deemed status provides the covered individual with immunity from medical malpractice lawsuits resulting from his/her subsequent performance of clinical medical, dental or related functions within the scope of his/her work at the free clinic.

Unlike health centers, free clinics are not deemed as an entity. Free

## FTCA Free Clinic Deeming Application

The Bureau of Primary Health Care is pleased to announce the release of [Calendar Year 2013 Federal Tort Claims Act \(FTCA\) Deeming Application for Free Clinics, PAL 2012-04](#).

[CY2013 Free Clinic Deeming Application](#)

**2013 Free Clinic FTCA Applications were due July 27, 2012.**

## Did you know?

Currently over 135 free clinics sponsor individuals.

Over 5,000 health care professionals are deemed to be employees of the Public Health Services for medical malpractice coverage provided by the Federal Tort Claims Act

# Additional Resources



- [FreeclinicsFTCA@hrsa.gov](mailto:FreeclinicsFTCA@hrsa.gov)

Federal Tort Claims Act Program

Office of Quality and Data

Bureau of Primary Health Care

Health Resources and Services Administration

5600 Fishers Lane, Room 6A-55

Rockville, MD 20857

Phone: 301-594-0818

Fax: 301-594-5224

# Questions?



Kim C. Stanger  
Holland & Hart LLP  
Boise, Idaho  
(208) 383-3913

[kcstanger@hollandhart.com](mailto:kcstanger@hollandhart.com)